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In the Supreme Court of the United States

TROY KING, DAVID W. MÁRQUEZ, TERRY GODDARD, BILL LOCKYER, JOHN SUTHERS, CARL DANBERG, THURBERT E. BAKER, LAWRENCE WASDEN, LISA MADIGAN, STEVE CARTER, THOMAS J. MILLER, PHILL KLINE, GREGORY D. STUMBO, CHARLES FOTI, G. STEVEN ROWE, J. JOSEPH CURRAN, JR., THOMAS F. REILLY, MIKE COX, JEREMIAH W. NIXON, MICHAEL MCGRATH, JON BRUNING, ROY COOPER, JIM PETRO, HARDY MYERS, HENRY MCMASTER, LARRY LONG, PAUL G. SUMMERS, ROB MCKENNA, PEG LAUTENSCHLAGER, AND PATRICK CRANK, IN THEIR OFFICIAL CAPACITIES AS ATTORNEYS GENERAL OF ALABAMA, ALASKA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, GEORGIA, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NORTH CAROLINA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, WASHINGTON, WISCONSIN, AND WYOMING, RESPECTIVELY, PETITIONERS,

v.

GRAND RIVER ENTERPRISES SIX NATIONS, LTD., NATIONWIDE TOBACCO, INC., AND 3B HOLDINGS, INC., RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF THE PETITION

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REPLY IN SUPPORT OF THE PETITION

As explained in the petition, certiorari is warranted because the Second Circuit's judgment resolves an important issue expressly reserved in *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979), in a manner that impinges upon state sovereignty and ignores the federalism component of due process limits on the exercise of personal jurisdiction. Among its other flaws, the Second Circuit's decision improperly conflates separately accountable branches of state government by presuming that state Attorneys General can somehow "agree" to enact legislation in their respective States, and accords a court in New York the power to judge the validity of statutes enacted by thirty other States, even though those statutes govern only in-state transactions.

In their opposition, respondents largely steer clear of the considerations that justify certiorari. They leave unanswered petitioners' contention that the question presented—whether a court in one State may exercise personal jurisdiction over the Attorney General of another State in a lawsuit challenging laws enacted and enforced in the latter State—concerns a jurisdictional issue of crucial importance to the States and the interstate judicial system. See Pet. 16, citing Robert L. Stern et al., *Supreme Court Practice* 249, 253 (8th ed. 2002); see also Pet. 6-7. Also left unanswered is petitioners' argument that, given the state sovereignty concerns involved here, the direct conflict between the Second Circuit's judgment and *PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp. 2d 1179, 1190 n.8 (C.D. Cal. 2000), weighs in favor of certiorari. See Pet. 16 n.4, citing *Massachusetts v. United States*, 435 U.S. 444, 453 (1978).

When respondents turn to the factors that traditionally guide the exercise of certiorari jurisdiction, they oddly claim that the petition should be denied because the Second Circuit did not "decide[] an important federal question that has not been settled

by this Court." Opp. 4. But, as noted above, the petition established that the Second Circuit resolved an issue that this Court reserved in *Leroy v. Great W. United Corp.*, *supra*. See Pet. 7-9. Respondents do not even bother to cite *Leroy*, let alone explain why the Second Circuit's resolution of that issue does not warrant review. See Pet. 16, citing Stern, *supra*, at 234-235 ("certiorari has been granted where the court of appeals decision is based upon a point expressly reserved or left undecided in prior Supreme Court opinions").

The remainder of petitioners' arguments provide no plausible basis to deny the petition.

A. Respondents devote several pages to the proposition that the Master Settlement Agreement (MSA) has a "nexus" with the Escrow Statutes—but, notably, not the Certification Statutes—and therefore that their suit can be considered a challenge to the MSA as much as a challenge to the Statutes. Opp. 4-6, 7-9. That is incorrect. Contrary to respondents' repeated suggestion (Opp. 3, 5, 7, 8), their lawsuit challenges and seeks to enjoin enforcement of the Escrow and Certification Statutes only, not the MSA itself. See Pet. 11-12. Moreover, as state Attorneys General, petitioners could not possibly have agreed in the MSA to "enact" the Statutes. See Pet. 9-11. It follows that personal jurisdiction over petitioners cannot be predicated on the mere fact that the MSA negotiations took place in New York.

Relatedly, respondents assert that the Escrow Statutes give them a choice between joining the MSA and depositing money into escrow based upon the number of cigarettes they sell within each State, and from that assertion that conclude that state officials charged with enforcing the Escrow Statutes could be sued not only in New York (as the Second Circuit held), but in *any* of the other 45 States that are party to the MSA. Opp. 5. There is no basis in law or logic for this breathtaking

conclusion, which even the Second Circuit did not adopt, and which would expand notions of personal jurisdiction beyond all recognition.

B. Respondents contend that petitioners do not enjoy due process protections because they have been sued in their official capacities. Respondents reason as follows: this suit against petitioners "is, in essence, an action against the State[s]" themselves; unlike individuals, States are not "person[s]" entitled to due process safeguards; and therefore petitioners are not protected by due process. Opp. 6-7.

Respondents' syllogism founders on the fact that they sued petitioners under the exception to sovereign immunity set forth in *Ex Parte Young*, 209 U.S. 123 (1908). According to *Young*, state officers sued in an injunctive action may not invoke sovereign immunity because "the use of the name of the state to enforce an unconstitutional act * * * is a proceeding without the authority of, and one which does not affect, the state in its sovereign capacity." *Id.* at 159. Rather, such an (allegedly) unconstitutional act "is simply an illegal act upon the part of a state official," who "is stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct." *Id.* at 159-160 (emphasis added); see also *Central Virginia Community College v. Katz*, 126 S. Ct. 990, 1005 n.14 (2006) (a *Young* lawsuit does not "constitute a suit against the State").

Because respondents sued petitioners instead of their respective States, the same proposition that makes petitioners amenable to suit—their status as state officials—permits them to invoke the due process protections available to other individual defendants. Respondents' contrary position is untenable. State officers sued under the *Young* doctrine are subject to contempt sanctions if they violate judicial directives. See *Hutto v. Finney*, 437 U.S. 678, 690 (1978). Edward Young

himself, Attorney General of Minnesota and the protagonist of *Ex Parte Young*, was jailed for contempt in what was, of course, a suit authorized by the *Young* doctrine. 209 U.S. at 126. If state officials named as defendants are subject to the contempt power, it stands to reason that they be afforded due process protections, including those limiting the courts' power to obtain jurisdiction over their persons. Cf. *Echievarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24, 29 (1st Cir. 1988) ("the defendant officer should also be personally served, given that the action is directly against him, that some action or inaction is requested from him, and that he might be held in contempt if he were to violate the court's orders").

It therefore is unsurprising that federal courts regularly recognize and enforce the due process limits of personal jurisdiction over out-of-state officers sued in their official capacities. See *United States v. Ferrara*, 54 F.3d 825, 828-831 (D.C. Cir. 1995); *id.* at 832 (Silberman, J., concurring) (agreeing that "the district court lacks personal jurisdiction over the defendant—even though she is being sued not as a person, but as an instrumentality of the state government"); *City of Virginia Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484, 487-488 (4th Cir. 1985); *Marshall v. Labor & Indus., State of Washington*, 89 F. Supp. 2d 4, 8-10 (D.D.C. 2000). And although it ultimately held that a court in New York could exercise personal jurisdiction over thirty Attorneys General from other States, the Second Circuit at least recognized that due process governed its inquiry. Pet. App. 9a-10a; see also *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1269 (5th Cir. 1978) (same), *rev'd on other grounds sub nom., Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).[1]

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[1] Even if respondents were right that *Ex parte Young* defendants may not invoke due process, the question presented asks "[w]hether principles of due process *and state sovereignty*" permit

C. Finally, respondents maintain that petitioners are subject to personal jurisdiction under New York law. Opp. 9-11. Respondents are wrong, but the point is irrelevant, for the question presented is whether personal jurisdiction can be exercised consistent with *federal* principles of due process and state sovereignty. See Pet. i. If the answer to that question is no, it does not matter what New York law allows. See U.S. const., art. VI, cl. 2.

* * *

The Second Circuit's judgment, troubling as it is for purposes of this case, portends significant harm for the future. A wide array of state officials—governors, attorneys general, legislators, banking superintendents, tax administrators, insurance commissioners—routinely meet with their counterparts under the aegis of organizations such as the National Governors Association and the National Conference of State Legislators. These officials confer on matters of mutual interest and often develop "best practices" solutions—including model legislation—to the problems their States share. Under the Second Circuit's holding, officials from one State risk subjecting themselves to personal jurisdiction in the State where a conference is held for purposes of lawsuits challenging their State's implementation of such a "best practices" solution, even if the solution was enacted or adopted by the former State, months later and through a separate branch of state government, in its state capital. That theory of

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the exercise of personal jurisdiction here, Pet. i (emphasis added), so respondents still would have to reconcile jurisdiction with principles of state sovereignty. See *PTI*, 100 F. Supp. 2d at 1190 n.8 (subjecting States other than California "to California jurisdiction" would "constitut[e] an extreme impingement on state sovereignty").

jurisdiction cannot be reconciled with principles of due process and state sovereignty, and warrants this Court's attention.[2]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[2] On remand from the Second Circuit's judgment, and after petitioners filed their certiorari petition, the district court denied respondents' motion for a preliminary injunction. See *Grand River Enters. Six Nations, Ltd. v. Pryor*, 2006 WL 1517603 (S.D.N.Y. May 31, 2006), appeal docketed, No. 06-2747 (2nd Cir.); see also *Grand River Enters. Six Nations, Ltd. v. Pryor*, 2006 WL 1817582 (S.D.N.Y. June 30, 2006) (denying injunction pending appeal).

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